

## AUTOTEL'S RADIO'S REPLY IN SUPPORT OF PREEMPTION PETITION

Citizens Utilities Rural Company, Inc. (Citizens) has responded to the above-referenced petition. Its response incorrectly assumes that the mere filing of a dismissal document by the state Commission takes the matter out of the jurisdiction of 42 U.S.C. 252(e)(5).

### ADDITIONAL FACTUAL BACKGROUND

After the original interconnection agreement (ICA) was arbitrated through the Arizona Commission (ACC), Citizens refused to conform the agreement to the ACC's Order, and thus the final ICA was never filed. Had Citizens prepared the agreement in accordance with the ACC's Order, the agreement would have expired by its own terms on December 5, 2006, and a new ICA negotiation would be underway or completed by now.

Autotel tried to resolve the matter without the ACC's assistance for a year. Finally, a year after Citizens had refused to conform its standardized ICA to the ACC Order, Autotel asked the ACC to arbitrate a Bona Fide Request for and Request for Termination for Exemption, and then a Petition for Arbitration.

These were clearly "open issues" presented to the ACC. The ACC did not schedule any substantive proceedings to review these open issues.<sup>1</sup> The ACC did not ask Autotel to explain why an executed agreement was not filed. The ACC did not make any determination as to whether the contract language proposed by Autotel meets the requirements of the ACC's Order.

Thus, the ACC has left Autotel in a regulatory limbo, with no way to obtain a final ICA that complies with the ACC's Order. The ACC

has chosen to punish Autotel for its persistence by denying it an interconnection agreement – a result that is not in compliance with the goals and purposes of the Telecommunications Act.

The ACC failed to act on two separate regulatory events. The requesting carrier (in this case, Autotel) is required to notify the state commission when it makes a bona fide request of a rural telephone company for interconnection. Either party may then file for arbitration within the 135 to 160 day filing window from the date of that request. Autotel did what it was required to do and is allowed to do under the Telecommunications Act – filing both the bona fide request notification; and then the request for arbitration.

#### ADDITIONAL LEGAL ANALYSIS

The FCC has the authority to look behind a state agency's dismissal of a carrier's claim in order to determine whether the agency has failed to act to carry out its responsibility. If a state commission could merely dismiss a case appropriately before it, citing procedural grounds, without recourse to the FCC preemption process, that would undermine the purpose of the preemption statute.

A state commission can fail to act to carry out its responsibility under 47 U.S.C. 252(e)(5) when it "fail[s] to interpret and enforce existing interconnection agreements." In re Starpower Commc'ns. LLC Petition for Preemption of the Virginia State Corporation Commission, CC Docket No. 00-52, Memorandum Opinion and Order, 5 FCC Rcd. 11277, 11280 para. 6 (2000) ("Starpower"). Interpretation and enforcement of interconnection agreements is within a state commission's responsibilities. Id. at 11279-80, para. 6. Because of their role in the approval

process, state commissions are fit to settle disputes arising from interconnection agreements. *Id.* The power to interpret and enforce interconnection agreements is an implicit component of the power to arbitrate and approve such agreements. *Id.*

In *Starpower*, the state commission failed to act when it declined to resolve the petitions before it and also declined to interpret the existing interconnection agreement. *Id.* at 11280, para. 7. The FCC preempted the state's authority, applying section 252(e)(5) with broad scope: [T]he Commission's existing rules state that it will preempt a state commission's jurisdiction for a "failure to act" under section 252(e)(5) in those "instances where a state commission fails to respond, within a reasonable time, to a request for mediation or arbitration, or fails to complete arbitration within the time limits of [S]ection 252(b)(4)(C)." This rule, promulgated in the First Report and Order, addresses only the Commission's 252(e)(5) responsibilities in the context of a state's "failure to act" with respect to its mediation and arbitration obligations pursuant to Section 252. The rule does not consider the Commission's Section 252 responsibilities in the context of a state's "failure to act" with respect to its other Section 252 obligations. In adopting those rules, however, the Commission did not consider whether a state commission could "fail to act" in the context of a subsequent proceeding to interpret or enforce an existing interconnection agreement. In this proceeding, we apply Section 252(e)(5) for the first time to matters outside the scope of mediation and arbitration.

*Id.* at 11279 para. 5.

This broader application of § 252(3)(5) is consistent with the approach taken by federal

appellate courts. For example, the Eleventh Circuit explained, "[T]he authority to approve or reject agreements carries with it the authority to interpret agreements that have already been approved." *Bellsouth Telecomm. v. MCImetro Access Transmission*, 317 F.3d 1270, 1274 (11th Cir. 2003). "[T]he Act's grant to the state commissions of plenary authority to approve or disapprove these interconnection agreements necessarily carries with it the authority to interpret and enforce the provisions of agreements that state commissions have approved." *SW. Bell Tel. v. Pub. Util. Comm'n*, 208 F.3d 475, 479-80 (5th Cir. 2000) (holding that commission has authority to determine whether calls from one carrier to another ISP are local calls). See also *SW. Bell Tel. Co. v. Brooks Fiber Comm. of Okla., Inc.*, 235 F.3d 493 (10th Cir. 2000) (deferring to FCC's reasonable interpretation in *Starpower*); *Ill. Bell Telecomm. Co. v. Worldcom Technologies Inc.*, 179 F.3d 566, 573 (7th Cir. 1999) (holding it is within state commission's authority to determine what parties intended under the agreement).

Similarly, in another matter, a state commission declined to exercise jurisdiction over an interconnection dispute because the dispute involved an interpretation question of a particular contract term. In *re MCImetro Access Transmission Services, LLC* Petition for Preemption of the Jurisdiction of the New York Public Service Commission, CC Docket No. 02-283, Memorandum Opinion and Order, 17 FCC Rcd. 23953, 23956-57 para. 9 (2002). Relying on *Starpower*, the FCC in *MCImetro* preempted state jurisdiction because interpretation and enforcement disputes lie within a state's responsibilities, and the state failed to act to carry out its responsibility. *Id.* at 23955-56 para. 8. both of these cases centered on dispute of the same term

"reciprocal compensation for internet bound traffic"

The Starpower Order also commented on the availability of concurrent avenues for relief. A party's right to seek alternative remedies includes the ability to seek relief concurrently in Federal court and from the FCC. We note that Starpower's appeal to the U.S. District Court for the Eastern District of Virginia seeks only a determination that the Virginia Commission failed to exercise its discretion properly. The appeal does not ask the District Court to interpret the underlying merits of the dispute or otherwise address the substance of the case.

. Starpower, 5 FCC Rcd. at 11281 para.

8. Starpower explained that a pending review of a state commission's order in federal court does not preclude the FCC from finding that the state commission failed to act. *Id.*

As explained in the petition, the situation in this matter is also akin to that in *In re Petition of MCI for Preemption Pursuant to Section 252(e)(5) of the Telecommunications Act of 1996*, 12 F.C.C.R., 15594. In that case the FCC explained that a state agency can fail to act under section 252(e)(5) even if it has issued an arbitration order, if that order is a general dismissal that does not resolve all issues "clearly and specifically" presented to it. *Id.* at 27. See also *Global NAPS, Inc. v. Federal Communications Commission*, 291 F.3d 832 (D.C. Cir. 2002) ("The FCC's interpretation thus suggests that only if the state commission either does not respond to a request, or refuses to resolve a particular matter raised in a request, does preemption become a viable option") (emph. added).

In *MCI Telecomms. Corp. v. BellSouth Telecomms., Inc.*, the court determined that:

The Act imposes various duties

on incumbent local exchange carriers and sets forth two methods for determination of the terms and conditions under which any specific incumbent will allow any given competitive carrier to interconnect with the incumbent's facilities and obtain access to its network elements. The first method - the preferred method – is through an agreement voluntarily negotiated between the incumbent and competitive carriers. The second method, applicable only to the extent that voluntary negotiation fails, is through arbitration of "any open issues." 47 U.S.C. § 252(b)(1). The statutory term "any open issues" makes clear that the right to arbitrate is as broad as the freedom to agree; any issue on which a party unsuccessfully seeks agreement may be submitted to arbitration.

MCI and BellSouth obviously would have been free to enter a voluntary agreement that included a compensation mechanism for breaches of the agreement. Nothing in the Telecommunications Act would have foreclosed any such voluntary agreement. Neither the Florida Commission nor BellSouth apparently contends otherwise. BellSouth chose, however, not to agree voluntarily to any such provision. That was BellSouth's right. When BellSouth determined not to agree, this became an "open issue" that MCI was entitled to submit to arbitration.

When the Florida Commission chose to act as the arbitrator in this matter, its obligation was to resolve "each issue set forth in the petition and the response, if any." 47 U.S.C. § 252(b)(4)(C). MCI's request for a compensation provision was such an issue. This was, therefore, an issue the Florida Commission was obligated to resolve. 112 F. Supp. 2d 1286, 1297 (D. Fla. 2000), *aff'd*,

298 F.3d 1269 (11th Cir. 2002).

The Starpower Order stated: "[W]e have found that a state commission has carried out 'its responsibility [under section 252]' when it resolves the merits of a section 252 proceeding or dismisses such a proceeding on jurisdictional or procedural grounds." 17 FCC Rcd. 23953 at 11280 para. 8 (citing Low Tech Designs Order, 13 FCC Rcd. 1755, 1758-59, paras. 5, 33 (1997)). In Starpower, however, the FCC assumed jurisdiction because the state commission expressly declined to resolve the dispute on the merits; the state commission did not dismiss the petition due to a procedural defect. *Id.* at 11280-81 para. 8. The same is true in the instant case. The Low Tech Designs Order states, "under our current rules, a state commission does not 'fail to act' when it dismisses or denies an arbitration petition on the ground that it is procedurally defective, the petitioner lacks standing to arbitrate, or the state commission lacks jurisdiction over the proceeding." 13 FCC Rcd. at 1775, para. 33. But in Low Tech Designs, the state commissions initiated proceedings, established pleading cycles, and allowed the parties to present their arguments on the issue of statutory prerequisites; and each of the state commissions determined the statutory requirement had not been met by the petitioner. *Id.* at 1775, para. 34. In the instant case, in contrast, the ACC merely made the conclusory assertion that xxx, and dismissed the matter without gathering any information or providing any opportunity for Autotel to present its evidence on the open issues.

FCC rulings and appellate decisions make it clear it the power to interpret and enforce approved interconnection agreements lies within a state agency's authority.

CONCLUSION

The statutory nine-month limit to resolve open issues has elapsed. None of the open issues have been resolved by the ACC. FCC preemption is appropriate. The Arizona Corporation Commission has refused to resolve open issues, instead dismissing the matter without deciding the open issues presented. It is therefore appropriate and necessary for the FCC to preempt the state's authority on these matters.

Respectfully submitted December 2, 2006.

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#### CERTIFICATE OF SERVICE

I, Marianne Dugan, hereby certify that on December 2, 2006, I sent the foregoing document via email to the staff person of the FCC identified in the attached service list and to the FCC's duplicating contractor Best Copy and Printing, Inc., by sending it to:

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